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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954.

No. 179.

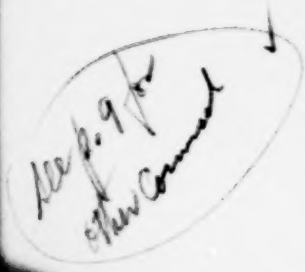
CECIL L. COURTNEY, PHILIP T. FERRIS AND RAY PARKS, PETITIONERS,

VS.

TY LOCKETT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

## BRIEF FOR RESPONDENT IN OPPOSITION.



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### STATEMENT.

Petitioners were subpoenaed to testify as witnesses at a statutory investigatory proceeding conducted by the County Attorney of Sedgwick County, Kansas, under the supervision of a judge of the District Court of Sedgwick County (R. 13-14, 42-43, 84-85). The proceeding is designed to perform functions of the traditional grand jury, and it was conducted as is customary, with the public excluded.

Although they had been fully advised by the court of their constitutional rights and had been granted complete immunity from prosecution for crimes related to any of their testimony, petitioners refused to comply with orders of the court requiring them to answer certain questions (R. 38-40, 50, 80-81, 95-96, 98). Thereupon they were summarily adjudged guilty of contempt of court (R. 40, 80-81, 98).

Petitioners applied to the Supreme Court of Kansas for writs of habeas corpus (R. 1-3, 3-6, 6-9). In their applications petitioners challenged the validity of their commitments on the sole grounds that:

> 1. The district judge exceeded his statutory authority by conducting the inquisition in secret;
>
> 2. Petitioners' rights under the Fifth and Fourteenth Amendments to the United States Constitution and under Section Ten of the Kansas Bill of Rights had been violated because petitioners were compelled to give self-incriminating testimony (R. 2, 4-5, 7-8).

The following additional question was passed upon by the Supreme Court of Kansas, although the Court indicated that it had not been properly raised by petitioners:

> 3. When a witness disregards an order of the Court in the immediate presence of the Court and within the personal view of the judge, does the Kansas or Federal Constitution require that the offenders be presented with formal charges and have the assistance of counsel prior to punishment for contempt of court? (R. 185-187.)

All three of the questions were resolved adversely to petitioners by the Supreme Court of Kansas (R. 173-192). Petitioners' applications for writs of habeas corpus were denied, as were their motions for rehearing (R. 189, 196).

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A reiteration of the questions passed upon below is made necessary by petitioners' attempt, in the instant proceeding, to avoid those questions and to substitute entirely different issues for determination by this Court.

Petitioners now contend that the secrecy of the inquisition proceeding, including their commitments for contempt, violated their rights under the Federal Constitution (Petition, p. 4). They rely on the case of *Re William Oliver*, 333 U. S. 257, to support their contention (Petition, p. 4). But before the Supreme Court of Kansas, petitioners' sole objection to the secrecy of the entire proceeding was based upon petitioners' construction of the inquisiton statute (R. 2, 4-5, 7-8). The Oliver case was never cited by petitioners in the four briefs which they filed below, including their brief in support of a motion for rehearing; and the Oliver case was never considered by the Court below (R. 172-193). The secrecy question, as a constitutional problem, made its first appearance in this proceeding when the petition for writ of certiorari was filed by petitioners.

## ARGUMENT.

### I. The Issues Raised by Petitioners in the Instant Proceeding Were Neither Presented to, nor Passed upon, by the Supreme Court of Kansas.

Petitioners invoke the jurisdiction of this Court under Section 1257 of Title 28 of the United States Code on the ground that, in the proceedings below, there were specially set up and claimed under the Constitution of the United States rights, privileges and immunities of the petitioners (Petition, p. 3). Respondent objects to the jurisdiction of this Court to entertain the issues raised by petitioners concerning the secrecy of the investigatory proceedings which gave rise to petitioners' commitments for contempt of court in that:

a. The objection to the secrecy of the proceedings, contained in both questions presented by petitioners for determination in the instant proceeding (Petition, p. 4), was neither presented to, nor decided by, the Supreme Court of Kansas.

b. No federal rights, privileges or immunities of petitioners, related to this question, were specially set up and claimed, or passed upon, in the proceedings below.

Petitioners' failure in this respect is jurisdictional. Ch. 646, 62 Stat. 929, 28 U. S. C. 1257.

The only objection to the secrecy of the inquisition proceedings, raised before the Supreme Court of Kansas, was grounded on petitioners' contention that the inquisition statute, according to petitioners' construction, did not authorize a secret proceeding. In substantially identical applications to the Kansas Supreme Court for writs of *habeas corpus* the three petitioners challenged the secrecy of the inquisition as follows:

> "II. Your petitioner further shows this Court that the said District Court before which the said inquisition was and is being conducted has exceeded the authority conferred upon it by G. S. 1949, 62-301, by conducting said inquisition in secret * * *" (R. 2, 4-5, 7-8).

The Supreme Court of Kansas prefaced its discussion of the secrecy question with the following statement of the issue as presented to the Court:

> "Petitioners stoutly contend the legislative history of the inquisition statute discloses it was not intended the inquisition should be held in secret * * *" (R. 183).

This Court has no concern with, or jurisdiction to review, the construction placed upon a Kansas statute by a

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Kansas court, absent a challenge to that court that a proposed construction of the statute conflicts with some provision of the Federal Constitution. *Erie Railroad* v. *Tompkins*, 304 U. S. 64; *Edelman* v. *California*, 344 U. S. 357, 358-9.

Petitioners assert now, for the first time, that the decision of the Kansas Supreme Court is in conflict with the decision of this Court in *Re William Oliver*, 333 U. S. 257 (Petition, p. 4). This Court will search in vain for a reference to the Oliver case in either the majority or dissenting opinions of the Kansas Supreme Court (R. 173-192).

Of conclusive significance is the discussion by the Kansas Supreme Court of the Sixth Amendment to the Constitution of the United States and Section Ten of the Kansas Bill of Rights.[1] Both provisions deal, in part, with

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[1]In all criminal prosecutions, the accused shall enjoy the right to *a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor,* and to have the Assistance of Counsel for his defense. Sixth Amendment to the Constitution of the United States.

In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; *to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.* No person shall be a witness against himself, or be twice put in jeopardy for the same offense. Section Ten of the Kansas Bill of Rights.

The italicized portion of each provision was excluded in quotation by the Kansas Supreme Court (R. 181).

the right of an accused to a *public* trial (Our italics). The language dealing with the "public trials" was eliminated from the provisions, as quoted by the Court, obviously because it was not material to any issues raised by the petitioners (R. 181). If the Kansas Supreme Court had actually been confronted with the issue of whether or not the secrecy of the inquisition proceeding violated petitioners' rights under either provision, it is inconceivable that no reference would have been made to the language pertaining to a public trial. Instead, the provisions were examined solely in the light of petitioners' contention that their inability to obtain counsel deprived them of constitutional rights. The Court set forth in its opinion the language of each provision "insofar as material" (R. 181).

Apart from the question of statutory construction, issues were raised below concerning petitioners' summary commitments and lack of counsel. But these issues, and the claim now abandoned by petitioners that they were compelled to give self-incriminating testimony, were the only questions presented to the Supreme Court of Kansas as effecting petitioners' rights under the Federal Constitution (R. 2, 4-5, 7-8, 173-192). The generality with which the petitioners now frame the questions they allege were presented in their applications for *habeas corpus* (Petition, p. 2), cannot transform a question, confined, below to the proper interpretation of a Kansas statute, into a constitutional issue reviewable by this Court. *Cincinnati, N. O. & T. P. R. Co.* v. *Slade*, 216 U. S. 78, 83; *Beauharnais* v. *Illinois*, 343 U. S. 250, 264-5, rehearing denied 343 U. S. 988.

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## II. No Important Question of Federal Law Is Presented by This Petition for Writ of Certiorari, and the Decision Below Is Consistent with Decisions of This Court.

Petitioners' objections to their summary commitments and to deprivation of counsel during the inquisition were not raised below in conjunction with the charge, now asserted, that the secrecy of the proceeding entitled petitioners to counsel and presentment with formal charges under the Federal Constitution (R. 2, 4-5, 7-8). The Supreme Court of Kansas decided only the narrower question of any person's right to presentment with formal charges and to the assistance of counsel at a summary proceeding for the punishment of a direct contempt of court (R. 182-3, 185). The resolution of these issues by the Kansas Court presents no important question of federal law, nor does it conflict with any decision of this Court.

Refusal of a witness to testify at an inquisition proceeding is properly punishable as a contempt of court. *Jack* v. *Kansas*, 199 U. S. 372. Petitioners declined to answer questions propounded by the County Attorney and his assistants, although they had been granted full immunity from prosecution for any crimes connected with their testimony (R. 38-40, 50, 80-81, 95-96, 98). They still refused to testify when so ordered by the judge of the District Court presiding at the inquisition proceeding (R. 38-40, 50, 80-81, 95-96, 98). In response to the Court's order, petitioner Courtney replied:

> "I am aware of that fact your Honor but I am not going to rat on anybody that I know anything on, if I knew anything I wouldn't tell it, I don't know anything and I ain't going to tell it" (R. 80).

Complete disregard for the Court's order was exhibited in the immediate presence of the Court and within the personal view of the judge by all three petitioners (R. 39-40, 80-81, 98).

> " 'Where the contempt is committed directly under the eye or within the view of the court, it may proceed upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form.' * * *" *Savin, Petitioner,* 131 U. S. 267, 277.
>
> "There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense." *Cooke* v. *United States,* 267 U. S. 517, 534.

Had petitioners set up or claimed below or had the Kansas Court decided, adversely to petitioners, the necessary constitutional objection to secrecy, still no important or substantial federal question would be before this Court. The Oliver case, upon which petitioners principally rely, involved a summary trial for perjury, denominated a form of contempt. It involved a necessary weighing of evidence, and a determination of conflicting facts inherent in trials. There was nothing to try in the cases at bar. Petitioners' admitted refusal to answer in the presence of the Court, unsupported by any other fact or circumstance, compelled summary adjudication.

## CONCLUSION.

Before the Supreme Court of Kansas petitioners primarily rested their case on an interpretation of a Kansas statute. Having failed in this respect petitioners now seek, for the first time, an adjudication that the interpretation given the statute violated constitutional provisions. Juris-

dictional limitations and due respect for the Court below prohibit this belated attempt.

The decision below involved no important question of federal law and is in full accord with decisions of this Court.

It is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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